IN THE INCOME TAX APPELLATE TRIBUNAL
Delhi Bench"G", New Delhi

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
BEFORE Mr. Bhavnesh Saini, JUDICIAL MEMBER

I.T.A. No. 4548/Del/2016
A.Y.: 2008-09

The Bank of Tokyo- Mitsubishi UFJ Ltd., 5th Floor, Worldmark 2, Asset 8, Aerocity, NH 8, New Delhi-110037 **PAN:AABCT3880D**	Vs.	DCIT (International Taxation) Circle-3(1)(1), New Delhi
[Appellant]		[Respondent]

Appellant by:	Sh. P.J. Pardiwala, Sr. Adv, Ms. Jasmin Amalsadwala, Adv & Sh. Surinder Bish, CA
Respondent by:	Sh. G.K. Dhall, CIT DR (Intl Tax)

Date of Hearing:	10	01	2018
Date of Pronouncement:	27	02	2018

O R D E R

PER N.K. SAINI, A.M:

This is an appeal by the assessee against the order dated 28th July, 2016 passed by the AO. Following grounds have been raised in this appeal:-

General

That on the facts and the circumstances of the case and in law, the ld. AO has erred in determining taxable income of the

Appellant at Rs. 244,00,13,120/- and raising aggregate demand of Rs. 21,64,82,147/- in the assessment order passed for the subject assessment year.

Each of the following grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.

1. Addition on account of interest received on External Commercial Borrowings ('ECBs') extended to Indian borrowers

(i) That on the facts and circumstances of the case and in law, the Hon'ble DRP erred in confirming the addition of Rs. 114,43,54,024/- proposed by the learned AO towards interest received by the Appellant's Head Office/overseas branches on ECBs extended to the Indian borrowers.

(ii) The Hon'ble DRP and Ld. AO have erred in not appreciating that in accordance with the provisions of Article 7 of the India – Japan Double Taxation Avoidance Agreement ('DTAA'), an amount commensurate to the role played by the Permanent Establishment ('PE') of the Appellant in India has already been offered to tax by the Appellant and therefore, nothing further could be brought to tax in India.

(iii) The Hon'ble DRP and Ld. AO have erred in observing that the interest would continue to be taxable under Article 11 of the DTAA, even though it has been acknowledgement by the AO himself that the ECBs may be partially connected with the PE of the Appellant in India. Such an observation is contrary to the express provisions of Article 11 of the DTAA, which clearly provides that in the express provisions of Article 11 of the DTAA, which clearly provides that in the event debt-claim is connected with the PE, the taxability of interest shifts from Article 11 to Article 7 of the DTAA completely, and not partially.

(iv) The Ld. AO has erred in not granting credit for tax deducted at source ('TDS') by the Indian borrowers on ECB interest taxed in the hands of the Appellant, while determining the tax liability of the Appellant in the impugned assessment order.

It is respectfully submitted that if complete TDS credit is granted to the Appellant in respect of ECB interest taxed for the subject assessments year, in accordance with the

undertaking filed with the Hon'ble DRP, the Appellant shall not press the ground for non-taxability of ECB interest.

3. Deduction under section 44C of the Act

Without prejudice to Ground 1 and 2 above, on the facts and circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in not considering the addition made towards ECB interest received from the Indian borrowers while determining the amount of deduction allowable under section 44C of the Act.

4. Excess levy of interest under section 234D of the Act

That on the facts and circumstance of the case and in law, the Ld. AO has erred in levying excess interest under section 234D of the Act.

5. Set off of brought forward business loss and unabsorbed depreciation

That on the facts and circumstance of the case and in law, the Ld. AO has erred in not allowing the set-off of brought forward losses amounting to Rs. 34,49,96,933/- against the taxable income of the subject assessment year in the impugned order.

2. Ground no. 1 is general in nature. Vide ground no. 2, the grievance of the assessee relates to the confirmation of addition of Rs. 114,43,54,024/- made by the AO on account of interest received by the assessee on ECBs extended to the Indian borrowers.

3. Facts of the case, in brief, are that the assessee is a company incorporated in Japan and resident in Japan within the meaning of Article 4 of the agreement for avoidance of double taxation and prevention of fiscal evasion between India and Japan (DTAA). During the year under consideration, the assessee was carrying out banking business in India through its three branches located in Mumbai, New Delhi and Chennai. For the year under consideration, the assessee filed its return of income

under section 139(1) of the Income Tax Act, 1961 (hereinafter referred to as the 'the Act') declaring therein total income of Rs. 95,6,62,163/- after the set – off of brought forward losses of assessment year 2000-01 amounting to Rs. 34,49,96,933/-. Later on, the case was selected for scrutiny. The AO passed the draft assessment order dated 27th December, 2011 wherein certain additions / disallowances were proposed. Aggrieved by the assessment order, the assessee filed objections before the learned DRP who rejected the objections and confirmed the draft assessment order passed by the AO. In pursuant to the directions issued by the learned DRP, the AO passed the final assessment order on 27.12.2011 at an income of Rs. 36,39,97,239/-. Against the said order, the assessee preferred an appeal in ITA No. 5104/Del/2012 before the ITAT challenging the additions / disallowances made by the AO and the ITAT vide its order dated 19th September, 2014 set aside the order on certain issues to the file of the AO for fresh adjudication. Thereafter in compliance to the directions given in the aforesaid order, the AO conducted the remand proceedings and passed the draft assessment order 21st December, 2015 under Section 143(3) read with section 144(C)(i) of the Act wherein addition of Rs. 114,43,54,024/- was proposed towards interest received by the head office / other overseas branches of the assessee on ECBs extended to the Indian borrowers.

4. Now, the assessee is in appeal.

5. During the course of hearing, the learned CIT DR, at the very outset, stated that this issues is squarely covered vide order dated 26.4.2017 for the assessment year 2011-12 in ITA No. 306/Del/2016

passed by the ITAT [I-1] Bench New Delhi in assessee's own case. Copy of the said order was furnished which is placed on record. The learned counsel for the assessee could not controvert the aforesaid contention of the learned CIT DR.

6. After considering the submissions of both the parties and the material on record, it is noticed that an identical issue having similar facts was a subject matter of the departmental appeal for the AY 2011-12 in ITA No. 306/Del/2016 wherein the issue has been decided in favour of the department and against the assessee, the relevant findings are given in para 20 to 26 of the said order dated 26.04.2017 which are reproduced verbatim as under:-

> *"20. Ground No. 7: It is regarding addition on account of interest received from external commercial borrowings (ECB) given to Indian borrowers.*
> *21. The facts in brief are that the head office / other overseas branches of the assessee are in receipt of interest earned from the external commercial borrowings (ECB) given to the Indian borrowers parties. Indian branches of assessee help its Indian customers in arranging funds through its overseas branches as the banks in India cannot lend in foreign currency except for providing export credit to its customers as per the extant Reserve Bank of India Regulations. Indian branches of the assessee, based on the request of the customers pass on the lead to the overseas branches along with the credit evaluation report, terms and conditions of approval and details of security documents to be entered into. Indian branches evaluate the customer on an on-going basis and passes on the lead information to its overseas branches on activities related to credit rating, monitoring of covenants etc. On receipt of the information from the Indian branches of the assessee, the overseas branches of the bank do the booking of the loan based on the terms and conditions of the approval. The agreement and security documentations are entered between overseas branches and the borrowers. Indian branches receive syndication fees from its head office / other overseas branches for the services rendered by it in relation to ECB.*
>
> *22. The case of authorities below is that interest income accrues and arises as under :*
>
> *(i) Interest income accrues and arises in India under section 9(1)(v) of the Act. Since the ECB do not form part of the asset base of the PE in India and is not effectively connected with the PE, ECB interest is chargeable to tax under Article 11 of the Treaty between India and Japan (para 9.2 and 9.3 at page nos. 207-208 of appeal set).*
>
> *(ii) No tax credit, however is allowable to the assessee, since, any new claim can be made by the assessee only through a revised return of income (para 9.7 at page 210*

of appeal set)

(iii) Since interest is payable on a net of tax basis i.e. tax has been borne by the borrowers, the ECB interest is grossed up for arriving at the income to be included in the computation of total income of the assessee (para 9.8 at page 210 of appeal set).

23. In support of the ground the ld. AR made following submissions:-

(i) At the outset, we wish to submit that due to lack of the details/information, the Tribunal in the order passed for AYs 2007-08 and 2008-09 had remanded back the issue of taxability of ECB interest to the file of the AO for denovo consideration. However, as noted by the DRP, since all the requisite details have been filed by the assessee for AY 2010-11 and the issue has been decided accordingly, it is submitted that the matter is not required to be restored back to the AO for AY 2010-11 and the same be decided by the Tribunal on merits.

(ii) ECBs given to the Indian customers are effectively connected with the Indian PE of the assessee and an amount i.e. syndication fee, which is commensurate with the role played by the Indian PE and is attributable to the Indian PE has already been offered to tax, by the assessee, in the computation of its income taxable in India as per the provisions of Article 7 of the Indo-Japanese treaty; and therefore, in view of Article 11(6) read with Article 7 of Indo-Japanese treaty, nothing further can be brought to tax in India.

(iii) During the year under consideration, the Indian PE/branches of the assessee received an amount of Rs 14,58,92,297 as syndication fee from its HO/other overseas branches for the services performed by the Indian branches in relation to ECBs, which has been credited to profit & loss account of the Indian branches of the assessee and offered to tax in the return of income filed by the assessee. Apart from this, the assessee has offered to tax an amount of Rs 2,14,77,903 as transfer pricing adjustment with respect to ECB syndication fee in the return of income. Therefore, the assessee has already offered to tax an amount of Rs 16,73,70,200 (Rs.14,58,92,297 + Rs 2,14,77,903) as fee received by the Indian PE of the assessee from its HO/other overseas branches for the services performed in relation to ECBs, which has been accepted to be an arms' length price by the Revenue.

(iv) The Mumbai Tribunal in the case of Credit Lyonnais (ITA No. 1935/Mum/2007) has held that ECB interest is not attributable to the Indian branches of the assessee and only the fee is taxable in the hands of the Indian branches of the assessee for the role played by it in arranging the ECBs.

(v) Without prejudice to the claim of non-taxability of ECB interest income, the AO has erred in not allowing the credit for tax deducted at source on ECB interest. Sample copies of TDS certificates were also furnished to the AO. Further, that the taxes have been deducted is an admitted position since the AO has himself grossed up the entire amount of ECB interest by the amount of tax borne by the borrowers. Once this is so, in view of section 205 of the Act, the necessary credit has to be given to the assessee.

(vi) Tax at source has been deducted as evident from the sample copies of TDS certificates furnished before the AO and the AO has also admitted the same by grossing up the ECB interest by the amount of tax borne by the borrowers, therefore,

no interest under section 234B of the Act can be levied for the tax demand on account of ECB interest.

(vii) Even on merits, interest under section 234B of the Act is not applicable since ECB interest received by the assessee from the borrowers is subject to tax deduction at source under section 195 of the Act. Reliance is placed on the judgment of the Delhi High Court in the case of ***GE Packaged Power Inc. [2015] 373 ITR 65*** *wherein it has been held by the Delhi High Court that no interest under section 234B of the Act can be levied where the payment to non-resident payee is subject to tax deduction at source.*

24. The ld. CIT [DR], on the other hand, contended that ECB interest has been earned by the HO/other overseas branches of the assessee from third party. Such ECB is not the debt claim of the Indian branches of the assessee and, therefore, ECB interest is not effectively connected with the Indian branches.

If tax is borne by the borrowers, credit for TDS on ECB interest is not allowable to the assessee.

If direction is issued for allowability of TDS credit, the same should be granted to the assessee subject to verification of the same from the deductors/borrowers.

25. The ld. AR rejoined with the submission that when the tax is born by the payer of the income, income is grossed up by the amount of tax born by the payer and such grossed up interest is taxed in the hands of the payee. Any taxes with-held by the payer is allowable as credit to the payee of income against the income taxed in the hands of the payee. He submitted that CBDT vide its Circular No. 785 dated 24.11.1999 has also clarified that where the payment is made of taxes i.e. tax is borne by the payer of the income, the payer is under obligation to issue TDS certificate to the payee, since such grossed up income is taxable in the hands of the payee and the payee is eligible to claim the credit of such taxes with-held against the income taxed in the hands of the payee.

26. After having gone through the above cited decision, we find that Mumbai Bench of the Tribunal in the case of Credit Lyonnais (supra) has held that ECB interest is not attributable to the Indian branches of the assessee and only the fee is taxable in the hands of the Indian branches of the assessee for the role played by it in arranging the ECB. The Hon'ble High Court of Delhi in the case of GE Package Powerink (supra) has been pleased to hold that no interest under section 234B of the Act can be levied where the payment to non-resident payee is subject to tax deduction at source. In the present case, the Assessing Officer himself had admitted by grossing up the ECB interest by the amount of tax borne by the borrowers that tax at source has been deducted. We are thus of the view that no interest under section 234B of the Act can be levied for the tax demand on account of ECB interest and interest under section 234B is also not chargeable since ECB interest received by the assessee from the borrowers was subject to tax deduction at source under section 195 of the Act. The Assessing Officer is thus directed to delete the addition made on account of interest received from ECB given to Indian borrowers. The ground No. 7 is accordingly allowed."

So respectfully following the aforesaid referred to order dated 26.4.2017 of the ITAT [I-1] Bench in assessee's own case, this issue is decided against the assessee and in favour of the department.

7. As regards to the ground no. 3 relating to deduction under section 44 C of the Act, it was common contention of both the parties that this issue becomes academic if ground no. 2 is allowed in favour of the department. We order accordingly.

8. Vide ground no. 4, the grievance of the assessee relates to the excess levy of the tax under section 234D. The facts related to this issue, in brief, are that the AO levied the interest under section 234D of the Act on the amount of refund granted to the assessee in the intimation under section 143(1) of the Act from the date of intimation i.e. 7th October, 2009 to the date of assessment order i.e. 28th July, 2016 passed pursuant to the remand back proceedings i.e. for a period of 82 months.

9. Now the assessee is in appeal.

10. The learned counsel for the assessee submitted that the assessee had claimed income tax refund amounting to Rs. 8,49,53,089/- in the return filed for the assessment year under consideration. It was further submitted that the return of income was processed under Section 143(1) of the Act wherein an amount of Rs. 9,30,13,120/- (including interest under section 244A of the Act amounting to Rs. 80,69,683/-) was determined as refundable to the assessee vide intimation dated 7th October, 2009 and the refund was subsequently adjusted against the tax demand for the AY 2007-08. It was further submitted that where no refund is due to the assessee on regular assessment, the assessee is liable to pay interest under section 234D of

the Act on the amount refunded under section 143(1) of the Act from the date of grant of refund to the assessee till the date of regular assessment and in the present case, interest under section 234D could have been levied only from the date on which the refund was granted to the assessee till the date of regular assessment and since the refund determined for the assessment year under consideration vide intimation dated 7th October, 2009 was adjusted against the tax demand for the assessment year 2007-08 on 19th March, 2012 the refund was actually granted to the assessee on, 19th March, 2012 and not on 7th October, 2009 i.e. the date of issuance of intimation. Therefore, the interest under section 234D of the Act should be charged from 19th March, 2012 i.e. the date of issuance of refund to the assessee and not from the date of intimation i.e. 7th October, 2009. It was further submitted that the regular assessment means the first assessment made in the regular course by the AO under section 143(3) of the Act and any assessment made pursuant to the appellate order cannot be regarded as regular assessment. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of ***Modi Industries Limited and Others vs. CIT and Anr*** reported at ***(1995) 216 ITR 795.*** Accordingly, it was submitted that in the present case as well since the regular assessment u/s 143(3) of the Act for the year under consideration was made on 29th August, 2012 interest under section 234D should have been levied up to the said date and not the 28th July, 2016 i.e. the date of the passing of the remand back order.

In his rival submissions, the learned CIT DR supported the order of the AO.

11. We have considered the submissions of both the parties and carefully gone through the material available on the record. To resolve the present controversy, it is relevant to discuss the provisions contained in Section 234D of the Act, which read as under:-

> *"234D. (1) Subject to the other provisions of this Act, where any refund is granted to the assessee under sub-section (1) of section 143, and—*
>
> *(a) No refund is due on regular assessment; or*
> *(b) The amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment,*
>
> *the assessee shall be liable to pay simple interest at the rate of [one half] per cent on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.*
>
> *(2) Where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of refund granted under sub section (1) of section 143 is held to be correctly allowed, either in whole or in part, as the case may be, the, the interest chargeable, if any, under sub-section (1) shall be reduced accordingly."*

12. From the above provisions, it is clear that where the refund has been granted to the assessee under sub section 1 of section 143 and no refund is due on regular assessment or the amount of refund exceeded the amount refundable on regular assessment the assessee shall be liable to pay simple interest @ one and half per cent on the whole or the excess amount so refunded from every month or a part of a month comprised in the period from the date of grant of refund to the date of such regular assessment and subsequently if the amount of refund granted under sub section 1 of section 143 of the Act is held to be correctly allowed either in whole or in part as the case may be as a result of an order under section 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 263 or Section 264 or

Section 245D(4) of the Act then the interest chargeable, if any, under sub section 1 shall be reduced accordingly. Therefore, the interest on the excess amount of refund shall be charged from the date of grant of refund to the date of regular assessment. As regards to the meaning of regular assessment, the Hon'ble Supreme Court in the case of ***Modi Industries Limited and Others vs. CIT and Anr 1995 216 ITR 795*** (Supra) held as under:-

> *"Assessment' has been given an inclusive meaning in sub section (8) of section 2. It includes reassessment. "Regular assessment" has been definded in section 2(40) to mean the assessment made under section 143 or 144. In the contrext of sections 140A, 141 and 141A "regular assessment" could only mean the original assessment made under section 143 or 144. Having regard to the scheme of the Act and use of the phrase "regular assessment" in various sections of the Act, in section 214 "regular assessment" has been used in no other sense than the first order of assessment passed under section 143 or 144. If any consequential order has to be passed by the Income tax Officer to give effect to an order passed by the higher authority, that consequential order cannot be treated as "regular assessment" nor can the date of the consequential order be treated as the date of regular assessment."*

13. In the present case, the AO considered the regular assessment which was passed by the AO on 28th July, 2016 pursuant to the remand back proceedings on the direction of the ITAT. However, in the present case the regular assessment was framed by the AO on 29th August, 2012 in pursuant to the direction issued by the learned DRP, therefore, the interest on the excess refund was to be charged up to the date of regular assessment i.e. 29th August, 2012 and not to the assessment made on 28th July, 2016 in pursuant to the appellate order passed by the ITAT. We, therefore, direct the AO to charge the interest under Section 234D, if any, up to the date of regular assessment i.e. 29.8.2012 and not up to the date of subsequent assessment order passed i.e. 28.07.2016 in pursuant to the order of the higher authority i.e. the ITAT, in this case.

14. As regards, the ground no. 5 relating to the set off brought forward business loss and unabsorbed depreciation, it was the common contention of both the parties that it is to be allowed as per law. We, direct the AO to decide this issue in accordance with law.

15. In the result, appeal of the assessee is partly allowed.

(Order pronounced in the open court on 27.02.2018.)

Sd/- Sd/-

[BHAVNESH SAINI] **[N.K. SAINI]**
Judicial Member **Accountant Member**

DATED: 27.02.2018
SH

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar